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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 431

IRVING E. MORRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Irving E. Morris, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case.

Opinion of the Courts Below.

The judgment and sentence of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on the 22nd day of October, 1954. The District Court's judgment is not reported but is printed in the Record filed herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the trial court, was filed July 28, 1955. The opinion is not yet reported, but is set out in full in the Appendix hereto at pp. 31 to 40.

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed was entered July 28, 1955. The petition for rehearing was denied on August 30, 1955. This Petition for Certiorari is filed within thirty days of the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1254(1) and Rule 19(b) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW.

I. Whether it was not error for the trial judge in instructing the jury during the course of the trial regarding the admission of evidence:

A. To advise the jury that the defendant would be bound by hearsay statements of a conspirator engaged in merely the same type of conspiracy as that with which the defendant was charged?

B. To invade the province of the jury in instructing regarding the hearsay declarations of alleged co-conspirators by indicating to the jury that the charge of conspiracy

had been proved beyond a reasonable doubt, and by taking from the jury questions:

1. As to when a conspiracy was formed?
2. As to whether statements were made in furtherance of a conspiracy?
3. As to the truth or falsity of evidence *aliunde* those hearsay statements?
4. As to the truth or falsity of petitioner's testimony?
5. As to whether or not a conspiracy existed and as to whether or not petitioner were a member thereof?

II. Whether it was not error for the trial court to express his opinion upon the ultimate issue in the case, by discussing with them the reasons for his rulings on the admission of evidence?

III. Whether it was not error for the judge to advise the jury that he would direct a verdict were the case against the defendant not proved beyond a reasonable doubt?

IV. Whether it was not error for the judge to inform the jury that in case of conviction the defendant had a right of appeal, whereas the government had no right of appeal?

Statutes Involved.

The conviction took place under the provisions of Sec. 371, Title 18, U.S. Code, the provisions of which are set out in full in the appendix hereto.

STATEMENT OF THE CASE.

The petitioner was charged in Counts 1 and 2 of the indictment, together with one Richard Richmond, with having unlawfully possessed certain counterfeit $20.00 federal reserve notes and in Count 3 with conspiring with the same Richard Richmond to utter and possess counterfeit obligations of the United States and to commit the offenses alleged in Counts 1 and 2, in violation of Sec. 371, Title 18, U.S. Code. Richmond was prosecuted separately. A jury found petitioner not guilty of the substantive violations alleged in Counts 1 and 2, and guilty of the conspiracy charged in Count 3. Petitioner was sentenced to be imprisoned for five years. The Court of Appeals affirmed the conviction on July 28, 1955, and denied petition for rehearing on August 30, 1955.

Government witness Jack Richter testified that in Los Angeles in February of 1949, petitioner Morris said to one Aldrich in Richard Richmond's and witness' presence that he, Morris, "had some counterfeit $10.00 bills, and asked him if he knew someone who wanted to buy them, or if Bob Aldrich wanted to handle them himself . . . Bob said he didn't want to mess with it at all" (R. 25). That a few days later Aldrich told petitioner Morris in witness' presence that he, witness was "the man who was going to take the counterfeit money, . . . and Mr. Morris reminded him that any counterfeit money that was dealt in had to be dealt in $50,000 bundles" (R. 24). That he had conversations with Richmond thereafter (R. 26). That about April 15th in Los Angeles he received a letter from Chicago (R. 28) [set out at R. 372-373]. That he made and received telephone calls to Richmond in Chicago (R. 29) at a Chicago telephone available to the general public in a Chicago bar operated by

an Illinois corporation of which petitioner Morris was an officer (R. 107). That he and secret service agent Carli went to Chicago on April 26, 1949 (R. 29-30). That he and agent Carli had several conversations thereafter with Richmond, and that on May 2, 1949, Carli went with Richmond to a restaurant and that Morris went into the restaurant at that time (R. 31). That later, on May 2, 1949, Richmond and the witness rode in a cab which Morris was following in his car while the cab made a stop during which Richmond and the witness picked up a bag of $20.00 bills (R. 32-39) which were counterfeit (R. 257). The witness Richter and Richmond took the bag to a public locker, still being followed by Morris, where they deposited it, Richmond keeping the key (R. 39-40). That thereafter witness and Richmond drove away in the cab, which was stopped by agent Carli, while Morris still followed the cab (R. 42-44).

Government witness Agenlian testified he was the driver of the cab occupied by Richmond and Richter on May 2, 1949, and that while he stopped at the public locker a stranger told him "just drive around the block and they will be right out" (R. 48-51).

Government witness LeCuyer testified he saw Richard Richmond, Irving Morris, Bob Aldrich and Jack Richter conversing in Los Angeles at the place and about the time testified to by Richter (R. 110).

Secret service agent Carli testified that Richter delivered a counterfeit $20.00 bill to him in Los Angeles April 15, 1949, and that on April 25th he and Richter went to Chicago where he met Richmond (R. 190-193). That he first saw petitioner Morris on May 2, 1949 (R. 193). That between April 25 and May 2, 1949, he had a number of conversations with Richmond wherein Richmond agreed to

supply him with $100,000 in counterfeit notes for $30,000, at the conclusion of which a deal was made for the sale of counterfeit money (R. 193-208). That when the proposed arrangements had reached a certain stage in their actual consummation, he arrested Richmond and recovered counterfeit money (R. 208-210).

Government witness Richter was recalled and testified to a number of conversations he had with Richmond after meeting petitioner Morris (R. 240) during the months of February and March, 1949, both in Los Angeles and by telephone to Chicago, wherein Richmond sought to deal with Richter in counterfeit money, "in place of Aldrich" (R. 241). That on April 14, 1949, Richmond telephoned him, to say he would send him a sample of counterfeit money, and he received a sample by mail (R. 242-243). That he called Richmond at a telephone in Chicago, stipulated to be a public phone in a tavern with which petitioner Morris had a business connection (R. 107). Thereafter he told Richmond that he and his principal would buy the counterfeit money and would come to Chicago, which they did (R. 246).

A number of government witnesses testified to petitioner Morris' having driven his car behind the cab occupied by Richter and Richmond on the night of May 2, 1949.

The defendant testified that his alleged co-conspirator, Richmond, was merely a customer at his tavern (R. 280); that he first met Aldrich in Los Angeles (R. 282) but never discussed counterfeit money with either Aldrich or Richmond (R. 283); that his following Richmond on the night of May 2, 1949, was to collect a debt from Richmond (R. 284-285); that he never saw government witness Richter in his life until he saw him in the courtroom in January, 1950 (R. 283).

• • • •

Jury disagreements terminated two previous trials of Morris (Appendix 1, Petition p. 31).

REASONS FOR ALLOWANCE OF THE WRIT.

I.

In his many comments to the jury in the course of the trial, the trial judge gave confusing and erroneous instructions as to the admissibility and application of the declarations of co-conspirators, and in the course thereof, in effect directed the jury to find the petitioner guilty of the crime of conspiracy.

The errors of which we complain here arose from the court's frequent comments to the jury in explaining the reasons for his rulings to the jury. The several comments amounted to instructions to the jury as to the application and effect of the testimony in conspiracy cases. They were of considerable length and, for the most part, were in conflict with the charge of the court as ultimately given, as will be pointed out.

The Court of Appeals devoted its opinion to a discussion of whether or not there was sufficient evidence to take the case to the jury. The court wholly failed to discuss in its opinion the objectionable rulings made by the trial court in the presence of the jury at the time the evidence in question was being admitted.

The evidence relied on to lay a foundation for the introduction of statements of co-conspirators was as follows:

1. Government witness Richter overheard a conversation in Los Angeles between petitioner Morris and one Aldrich, at which time one Dixie Richmond was present, wherein Morris told Aldrich that "he had some counterfeit $10.00 bills and asked him if he knew someone who wanted to buy them or if Bob Aldrich wanted to handle them himself" and . . . Bob said "he didn't think he wanted to mess with it at all" (R. 25).

2. That a few days after the first conversation Richter met Morris with Aldrich, and "Aldrich told Mr. Morris that I was the man who was going to take the counterfeit money (R. 25-26) and—, . . . Mr. Morris reminded him that any counterfeit money that was dealt in had to be dealt in $50,000 bundles." (R. 24).

3. That Richter had conversations with Dixie Richmond, Morris' alleged co-conspirator (R. 26).

4. That Dixie Richmond went to Chicago (R. 27).

5. That Richter got a letter from Dixie on April 15, 1949 (R. 27-28).

6. That Richter spoke to Dixie Richmond at a public telephone located in a Chicago tavern operated by Morris (R. 29, 106-107).

7. That Richter and secret agent Carli went to Chicago (R. 29).

8. That Carli, Richter and Dixie Richmond had conversations in Chicago (R. 29-30).

9. That Morris entered a Chicago restaurant shortly after Carli and Dixie Richmond met there, and left before them (R. 31, 194).

10. That Richter and Richmond rode in a Chicago cab which Morris followed, the cab stopping twice to permit Richmond and Richter to pick up a bag of counterfeit money and to check the bag at a public locker (R. 33-42) and that Morris continued to follow until the cab was stopped and Richmond was arrested (R. 42-43).

• • • •

The declarations of Dixie Richmond, Morris' alleged co-conspirator, outside of Morris' presence, are contained in the testimony of Richter recalled (R. 240-252) and agent Carli (R. 190-212) Richmond's hearsay statements related

to his attempt to negotiate a sale of counterfeit money to agent Carli and government witness Richter, an informer.

It should be noted that the government alleged that the conspiracy commenced on the date of Richter's receipt of a letter signed "Dix" (R. 5), being April 15, 1949.

• • • •

A. The trial judge instructed the jury erroneously that the statements of petitioner's alleged co-conspirator bound petitioner if the two were in the same type of conspiracy.

The court said to the jury:

> "The jury will understand that no person can be bound by statements of another person out of his presence, where he had nothing to do with it, unless there is first evidence presented that some kind of agency existed. For instance, if a man has hired somebody to do something, or a conspiracy, or some evidence to show that there would be some authority, that he would have some right to speak, *or that they were engaged in the same type of conspiracy.*" (R. 27). (Emphasis added).

This statement by the court, was highly prejudicial to the defendant, omitting as it did the requirements that statements by alleged co-conspirators must be in furtherance of, and during the conspiracy. *Krulewitch* v. *United States,* 336 U.S. 440, 443. This same error was repeated from time to time by the court (R. 191, 239, 343).

But in addition to that error, the judge in the last part of his remark, specifically instructed the jury that the statements of Morris' alleged co-conspirator would apply to him, Morris, not merely if they were in the *same* conspiracy, but if they were in the same *type* of conspiracy.

If the jury believed all of the government's evidence, it could have found that quite distinct from the conspiracy al-

leged in the indictment, Morris was in a separate conspiracy with one Aldrich, the object of which was to utter counterfeit. Richter testified to alleged statements by Morris to Aldrich (R. 24, 25) regarding counterfeit money. But Richter also testified to a conversation (R. 241) in which Richmond told Richter that he, Richmond, ". . . was in a position to deal with . . . [Richter] . . . in counterfeit money in place of Aldrich." Thus from that conversation the evidentiary possibility existed that there were two distinct conspiracies instead of one, *viz.*, a conspiracy involving Aldrich and petitioner Morris on the one hand, and a conspiracy involving Richmond and parties unknown on the other.

The jury was instructed, however, that Morris would be "bound" by Richmond's statements although he and Richmond were not parties to the same conspiracy, *provided they were parties to different conspiracies of the same type.*

This Court has held that proof of complicity by co-defendants in similar but separate conspiracies, will not warrant imputation of the acts and statements of each to the other without relation to which scheme or schemes in which they were members. *Kotteakos* v. *United States,* 328 U.S. 750.

The Court further held in *Kotteakos* that where the jury was so misdirected, the Court could not assume that the jury disregarded the permission granted to ignore the separation between a conspiracy charged but not proven and one proven but not charged. (*Kotteakos, supra,* p. 769) In the same connection see *Brooks* v. *United States,* 164 F. 2d 142, 143.

B. The trial judge invaded the province of the jury in his comments to them regarding the application and effect of declarations of alleged co-conspirators.

The judge persisted in telling the jury that a time might come when there would be sufficient evidence of conspiracy so that he might permit the jury to hear evidence of statements by petitioner's alleged co-conspirator out of his presence (*e.g.*, R. 27, 30 at two places; 42). Further, when he determined to his own satisfaction that he might properly permit the jury to hear such evidence, *he advised the jury of that fact, giving them his reasons* (R. 191, 239) being the reasons previously predicted (R. 27) that an agency or conspiracy had been shown.

At Record 191, the court told the jury that "we have had that out now" and that "sufficient evidence" of agency or conspiracy had been shown to permit them to hear certain conversations.

We now ask the court to compare that statement with the court's statement quoted above under Point "A" to the effect that where evidence is presented showing that:

> ". . . an agency existed. For instance, . . . a conspiracy," (R. 27)

then the statements of one would bind another.

When the court stated at Record 191 that there was sufficient evidence to show that an agency or conspiracy existed, he did not even qualify the assertion with the words, "evidence from which the jury might find". Thus, the jury was clearly left with the impression that the trial judge was satisfied that a conspiracy had been proved (R. 27, 191).

* * * *

The crowning error of this kind occurred at Record 239, just before the proposed testimony of government informer

witness Richter as to statements by Dixie Richmond, petitioner Morris' alleged co-conspirator. The following took place:

> "The Court: Ladies and gentlemen of the jury, the questions which you will hear, and the answers thereto, have been objected to, and the objections have been overruled. You will hear the questions and the answers and they will be binding upon the defendant as to . . . [the conspiracy count].
>
> [Whereupon defendant objected to use of the word 'binding' as an invasion of the jury's province, to which the court agreed.]
>
> "The Court: They will be admitted. It is for you to determine, of course, whether they are binding or not. It isn't for the court to determine, but they may apply, or be admitted, is a better term—I do not mean and I do not want you to understand—I do not mean by any reason say that they are binding. That is for you to decide whether they are binding or not.
>
> "*They will be binding if you find they were made,* but you will be the persons to find whether they were actually made or not. That will be the point . . ." (R. 239). (Emphasis added.)

Thus the court in the first paragraph of the above instruction told the jury the testimony about to be given would be *binding* upon the defendant as to the conspiracy count.

We advert to the previous rulings of the trial judge with regard to this subject matter, discussed above, and respectfully suggest to this Court that the instruction was in line with those already given, of which we have complained, and was equally erroneous. The court having ruled that the testimony would be *binding* upon the defendant, and having previously told the jury (R. 27, 191) that such statements could be binding only if a conspiracy had been shown, revealed his own conviction that in truth and in fact the testimony thus far convicted the defendant.

While that error was itself severe, it was compounded by the judge's earlier statement that a *prima facie* case to him, meant a case proved beyond a reasonable doubt (R. 14, top). For the judge, by the unmistakable implications of the three comments (R. 14, 27, 239) told the jury he was satisfied that the defendant was a conspirator, beyond a reasonable doubt.

The defense objected to the statement by the court that the declarations of the alleged co-conspirator were binding upon the defendant (R. 239) The court sought to alleviate the error committed by a further remark to the jury (R. 239) which remark could only serve to confuse the jury.

The trial judge finally satisfied himself with the assertion that:

> "They will be binding if you find they were made . . ." (R. 239)

The instruction to the jury that statements of an alleged co-conspirator would be binding if the jury found that they were made is flagrantly erroneous.

The binding force of hearsay statements by an alleged conspirator upon his supposed co-conspirator is not derived from a determination of whether or not the statements were in fact made. Such statements might well have been made, yet they would not bind a party not present at the time they were made, unless certain preliminary conditions were satisfied *by proof aliunde those hearsay statements, viz.*:

a. The existence of the conspiracy must have been shown. *Minner* v. *United States*, 57 F. 2d 506, 511; *Montford* v. *United States*, 200 F. 2d 759, 760.

b. The connection of the defendant with the conspiracy must have been shown. *Minner* v. *United States, supra*, 511; *Glasser* v. *United States*, 315 U.S. 60, 74; *Kuhn* v. *United States*, 26 F. 2d 463, 464.

Further, even though those conditions be met, such statements do not bind the absent conspirator unless:

c. Such statements occurred during the existence of the conspiracy. *Krulewitch* v. *United States,* 336 U.S. 440, 442-3; *Minner* v. *United States,* 57 F. 2d 506, 511; *Lott* v. *United States,* 218 F. 2d 675, 681-2.

d. Such statements were made in furtherance of the objectives of the conspiracy. *Krulewitch* v. *United States, supra,* pages 443-4, *Lott* v. *United States, supra.*

Within recent years this Court has warned of pitfalls in the prosecution of conspiracy cases. Thus in *Krulewitch* v. *United States,* 336 U.S. 440, 453, this Court warned:

> "In other words, a conspiracy often is proved by evidence that is admissible only upon the assumption that conspiracy existed."

And in *Glasser* v. *United States,* 315 U.S. 60, 74, this Court cautioned against any procedure that would permit hearsay to lift itself by its own boot straps to the level of competent evidence.

We propose now to demonstrate that not only were the four conditions precedent to the consideration of hearsay evidence ignored in this case, thus permitting the hearsay evidence to supply its own imprimatur of admissibility but further, how the statements of the trial judge to the jury that such hearsay statements:

> ". . . will be binding if you find they were made . . ." (R. 239)

so far encroached upon the function of the jury, as to have amounted to a direction to the jury that it return a verdict of guilty against the petitioner. This the judge could not properly do. *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 408.

• • • •

1. Hearsay statements by defendant's alleged co-conspirator, *even if made,* could not bind the petitioner unless made *during* and *in furtherance* of the conspiracy. Many of the statements were made before the date the conspiracy commenced (R. 240-243) which, according to the indictment, was on April 15, 1949 (R. 5). Statements made before that date could bind *only* if the jury could also find that the conspiracy was in existence before that date. See *Minner* v. *United States*, 57 F. 2d 506, 511.

By instructing as he did, the court took from the jury the vital question as to when, if at any time, the conspiracy commenced. While it is true that statements made pursuant to an *existing* conspiracy bind those who join the conspiracy later, *United States* v. *Bucur*, 194 F. 2d 297, 302, *Minner* v. *United States*, 57 F. 2d 506, 511, the conspiracy must have been in actual existence when the statements were made. If the conspiracy were not yet in existence, such statements, even if made, could only be indicative of the intent of the party making them. *Minner* v. *United States, supra,* p. 511.

The statements in question, attributed to Dixie Richmond, were highly damaging in character, insofar as they bore closely on the question of the existence or non-existence of a conspiracy, the lawfulness of the combination, and the motives and intentions of those engaged therein. *Wiborg* v. *United States,* 163 U.S. 632, 658.

• • • •

2. The statement by the court that the declarations of the co-conspirator were binding upon the petitioner if they were actually made, is further completely erroneous in that again, even if they were made, and even if it be assumed that the supposed declarant were a member of a conspiracy with the petitioner, they could not be binding upon peti-

tioner unless made in furtherance of that conspiracy. Thus, the trial judge by his statement held that in his opinion those statements were in furtherance of a conspiracy, although even the judge had not heard them at that time.

> "The Court: Ladies and gentlemen . . . the questions which you *will* hear, and the anwers thereto . . . will be binding upon the defendant as to . . . [the conspiracy count]." (R. 239, Emphasis added).

Again, the judge invaded the province of the jury, it being the jury's function to determine whether such statements were made *during* and in furtherance of a conspiracy.

We observe parenthetically that in the court's charge to the jury given at the end of the case, he charged that statements of one defendant made out of the presence of the other are not binding upon the latter unless they were participants in, and the statements were made during and in furtherance of, the conspiracy charged. (R. 355).

Strangely, that proper instruction given in the court's charge (R. 355) served only to emphasize the error of which we now complain. The court having already ruled that the statements were binding, on the mere condition they were in fact made, the jury could only infer from that ruling, taken with the court's charge, that the statements could only bind if the defendant were in fact a conspirator, hence that the defendant was guilty of the conspiracy charged.

The logic of the situation, simply stated, is:

(a) Statements of a co-conspirator are binding if made, only if defendant is a conspirator (Court's charge R. 355).

(b) The statements of petitioner's alleged co-conspirator are binding if made (Court's comment, R. 239).

Therefore:

(c) Petitioner is guilty of conspiracy.

It is obvious that the court directed a verdict against the defendant as a logical inference. We submit that the jury's function ought not be reduced to a matter of formal logic whereby its only task is to draw inferences of guilt from the statements of the trial judge. Rather, we submit, the jury's duty is inductive in character. It properly is concerned only with the evaluation of testimony about facts.

• • • •

3. By instructing the jury that the testimony of his alleged co-conspirator's statements outside his presence were binding upon Morris, if true, the judge further encroached upon the province of the jury in that he thereby held as a matter of law that the evidence *aliunde* those statements (set out as items 1.-10., Petition pp 7-8, *supra*) was also true. But the law is that the evidence outside the hearsay statements should be such, that *if* believed, the jury can consider the hearsay. That is a far cry from holding as a matter of law that if the jury can *hear* the hearsay, they must accept the foundational statements as true.

The court's instruction in his charge at Record 355 again nails the defendant to the error. The jury is there instructed that statements of alleged co-conspirators if true, will not be binding upon the defendant unless he is shown, *beyond a reasonable doubt*, to have participated in the conspiracy charged by evidence outside those statements. It follows that the judge directed the jury by that charge and by his statement at Record 239, that the evidence *aliunde* the statements was true beyond a reasonable doubt.

The statements of Richmond out of his presence were as consistent with the truth of Morris' testimony as with

the truth of the government's foundational testimony (Items 1-10, Petition pp. 7-8, *supra*) In short, Morris' statements could be true and at the same time the statements attributed to Richmond out of Morris' presence could be true.

The mischief here is that if Morris' testimony were true, then the hearsay could not bind him, *even* if true. However, the court instructed the jury that those statements, if true, *did* bind him. It follows that if they were *binding* upon him then his testimony was of necessity false.

The crux of the error lay in telling the jury that it was sufficient merely for the statements to be true, for them to bind the defendant. Unfortunately, that is what the court told the jury.

It is difficult to see how the court could encroach deeper upon the province of the jury, and upon the right of the defendant to be tried by a jury.

• • • •

4. The court's instruction to the jury that the testimony of petitioner's co-conspirator out of his presence was binding upon him if believed (R. 239) destroyed the effect of petitioner's testimony before he had an opportunity to take the witness stand.

To be binding if believed, the jury must first have found that the testimony outside this hearsay showed petitioner's participation in the conspiracy to which the hearsay related. (See Court's instruction, R. 355). That evidence is summarized in items 1-10, Petition, pp. 7-8, *supra.*

We have shown, above, that by holding the hearsay true if believed, the judge held that the foundational testimony, on the basis of which hearsay was admitted, was true. Morris flatly contradicted the foundational testimony (R.

283-285). But the judge had already held the reverse of his testimony to be true.

* * * *

5. The court, by instructing the jury that the statements of petitioner's alleged co-conspirator were binding upon him if believed (R. 239) took from the jury questions that rightfully belonged to the jury, *viz*:

(1) Was there a conspiracy?

(2) Was petitioner a member thereof?

The court instructed elsewhere properly; that before a co-defendant's hearsay statements could bind the petitioner, the jury must first answer the two questions affirmatively (R. 355).

Though determined by the court that the evidence *aliunde* was such that the jury could *hear* the hearsay, it was the function of the jury to determine whether to believe the evidence outside the hearsay, so that it could, if it did so believe, bind the defendant with the hearsay.

As to the question of the respective functions of court and jury in conspiracy cases, we find divided views. The first is expressed in the trial courts, *e.g.*, the court's instruction in *United States* v. *Foster,* 9 F.R.D. 367, 378, and appears to be the majority view:

> ". . . in considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of statements and declarations of others . . . . You must determine the membership of a particular defendant from . . . his own actions . . . conduct . . . declarations . . , statements, and his own connection with the actions and conduct of others. However, once you have determined that a defendant was a member of the conspiracy . . . you may then consider as if made by him statements and declarations of other co-conspirators made in furtherance of the conspiracy and during the existence thereof . . ."

The majority view of the matter is again expressed in *United States* v. *Schneiderman,* 106 F. Supp. 892, 903, where the instruction given to the jury is substantially that given in *Foster, supra.* The court in *Schneiderman, supra,* page 924, admits getting the instruction from the *Foster* case, acknowledges the opinion of Judge Hand in the same case on appeal (*United States* v. *Dennis, et al,* 183 F. 2d 201) but declines to follow Judge Hand's restrictions.

The *Dennis* case represents the second view, and is the only federal appellate court case of which we are aware that discusses pointedly whether or not it becomes the duty of the jury first to determine the truth or falsity of the foundational testimony before applying statements of alleged co-conspirators against one another.

Judge Hand admits in the *Dennis* case, *supra,* the question as to who shall determine the truth or falsity of the foundational testimony "is not clear in the books" and says further "the law is, indeed, not wholly clear as to who must decide whether such a declaration may be used . . ." *United States* v. *Dennis, supra,* 230. He agrees that if the jury must first determine that there is a conspiracy before declarations of co-conspirators can apply to one another, then the declarations would serve merely to confirm what the jury had already decided.

There are a number of answers to Judge Hand's conclusion:

First, if the jury is permitted to apply the declarations of an alleged conspirator against his co-conspirator for the purpose of determining existence of a membership in a conspiracy, then the danger warned against in *Glasser* v. *United States,* 315 U.S. 60, manifests itself. This Court said in *Glasser, supra,* p. 74:

> "However, such declarations are admissible over the objections of an alleged co-conspirator, who was

> not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. . . . [Citing cases]. *Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence.*" (Emphasis added).

Further, Judge Hand's holding is in conflict with the clear implications of cases in other circuits. See *Kuhn* v. *United States,* 26 F. 2d 463; *Thomas* v. *United States,* 57 F. 2d 1039, 1041-2.

In the *Kuhn* case, the court said:

> "But, giving the rules of evidence in conspiracy cases the widest reasonable latitude, we are aware of no principle under which the declaration of one conspirator to another is competent to establish the connection of a third person with the conspiracy." (p. 464)

It would seem that the holdings in *Glasser,* and *Kuhn,* and *Thomas, supra,* are more closely adhered to by the trial courts in *Foster* and *Schneiderman, supra,* than by *Dennis, supra.*

The trial court in the case at bar held in one place (R. 239) that the hearsay statements of an alleged co-conspirator were binding upon the defendant if believed, without referring to the foundational evidence. At another place the judge instructed the jury that the hearsay statements were binding upon the defendant only if the existence of his participation in a conspiracy were shown *aliunde.* Obviously, the two instructions are at war with one another. The jury could not be required to make the election between them. *Bollenbach* v. *United States,* 326 U.S. 607, 613; *Nicola* v. *United States,* 72 F. 2d, 780, 787. Further, as we have demonstrated above, the correct instruction given by the court in his charge to the jury (R. 355) did not have the effect of curing his previous erroneous instruction (R. 239). Rather it had the effect of amplifying it.

We respectfully urge that the point which we now raise, *viz*: "What are the functions of court and jury in conspiracy cases?" is of vital importance to the administration of federal criminal justice. A question of such basic import to the trial of conspiracy cases ought not be permitted to remain unanswered. The specific question has not previously been decided by this Court. From the cases cited above, it appears that a conflict exists between the circuits. Inferences from this Court's remarks in *Glasser, supra,* indicate the question should be resolved in petitioner's favor, and that it was error to take the question from the jury.

In the law of confessions, the trial court ordinarily first determines voluntariness where disputed, preliminary to permitting the jury to hear the confession. The *substantive* question of voluntariness is then submitted to the jury anew. *Patterson* v. *United States,* 183 F. 2d 687, 689-90. In that connection, however, we suggest that it would be error for the trial judge to instruct the jury that *he* had, as a matter of law, determined that the confession was in fact voluntary, when at best his determination was limited to a procedural matter, *viz.,* admissibility. Clearly that would invade the jury's province.

By parallel reasoning, we urge that it constitutes an invasion upon the province of the jury for the trial judge to tell the jury that he has determined that a conspiracy exists and that they may therefore hear certain evidence and may, if they believe that evidence bind the defendant with it.

• • • •

We respectfully urge that as to this portion of our brief, dealing with the admission of evidence in conspiracy cases, and with the respective functions of court and jury in these cases, this Court ought to grant Certiorari.

The questions raised are of broad applicability in the administration of justice in the federal courts, the more so in view of the ever increasing numbers of indictments for conspiracy. Further, some questions we raise herein have not previously been decided in this Court.

We do find expressions by this Court as to the important nature of the questions we raise. Thus in *Blumenthal* v. *United States*, 332 U.S. 539, 551, this Court says:

> "If . . . it were . . . even doubtful that the admissions had been improperly received as against . . . [co-conspirators] . . . reversal would be required as to them."

We refer again to Judge Hand's comments in the *Dennis* case, cited herein, to the effect that the answers to some questions we now raise are by no means "clear in the books." We further strongly suggest that the conclusions at which Judge Hand arrived conflict with the implications to be drawn from this Court's decisions and the decisions of other circuits.

We urge that the importance of the questions raised is enhanced by the fact that they are basic to any conspiracy prosecution, and that the law in every circuit ought to be uniform so far as the procedure in conspiracy cases is concerned. Your Honors alone can provide that desirable uniformity.

II.

The court, by making known to the jury its reasons for permitting the jury to hear certain evidence, prejudiced the jury by expressing its opinion upon the ultimate issue in the case.

The question of the use, without restriction, of hearsay statements of co-conspirators may be a question of law for the court. Or it may be a mixed question of law and fact for the court and jury.

But whatever its nature, we urge that a judge mistakes his boundaries when he gives the jury his *reasons* for permitting them to hear that evidence.

Those reasons of necessity give the impression that he, the judge, is satisfied that the ultimate issue in the case has been proved against the defendant. We refer your Honors to *Quercia* v. *United States*, 289 U.S. 466, 470; *Starr* v. *United States*, 153 U.S. 614, 622; *United States* v. *Meltzer*, 100 F. 2d 739, 749.

In *Billeci* v. *United States*, 184 F. 2d 394, 403, the Court of Appeals for the District of Columbia, expressed the matter cogently in stating:

> "When a federal judge comments upon evidence by expressing his opinion upon phases of it, he is treading close to the line which divides proper judicial action from the field which is exclusively the jury's."

We submit that the judge in the case at bar crossed over the line. The Court here advised the jury that he could not let them hear certain evidence until a conspiracy was shown (R. 27); then advised them the question had been resolved (R. 191); and finally that such evidence, if believed, bound the defendant (R. 239). The court so far preempted the jury's function as to reduce that body to a rubber stamp.

We further urge that this Court may confidently expect confusion in the particular point raised here so long as even such judges as Judge Hand of the Second Circuit express doubt as to the proper spheres for judge and jury in conspiracy cases. (See our Point I, 6, *supra*).

III.

The trial judge informed the jury that should he let the evidence go to the jury, it was because he had determined that the defendant was guilty beyond a reasonable doubt.

Early in the trial the court made the following comment to the jury:

> "The Court: The responsibility is on the Government to find him guilty, and if the evidence does not show him guilty beyond a reasonable doubt then they would find the defendant not guilty." (R. 13).
>
> "The Government must make a *prima facie* case at least, *must show beyond a reasonable doubt that he is guilty, because if there was not evidence that the court considered prima facie case I would be compelled to direct a verdict.*" (R. 14)." (Emphasis added)

As to the first statement above the trial judge was completely in error in advising the jury it was the *government's* responsibility to find the defendant guilty, and that if the evidence did not show him guilty beyond a reasonable doubt, then *they* (the government) would find him not guilty.

Obviously, the responsibility is not the government's to find the defendant guilty, nor is it the responsibility of the government, if their evidence fails to show him guilty beyond a reasonable doubt, to find him not guilty.

No citation of authority and no argument that we might make could possibly assist this Court in observing the gross error in the trial court's observation to the jury. The error is plain and glaring.

We respectfully submit that the defendant was deprived of his right to a fair trial in accordance with due process of law when the jury was advised that if the *government* were not satisfied with the quantum of evidence adduced

the *government* would take steps to protect the defendant, *i.e.* would find him not guilty. Those steps not having been taken by the government at the close of the evidence, the jury was thus apprised of its clear duty to return a verdict of guilty.

The error was further amplified by the judge's second statement that:

> "The government must make a *prima facie* case, at least, must show beyond a reasonable doubt that he is guilty, because if there was not evidence that the court considered *prima facie* case, I would be compelled to direct a verdict" (R. 14).

Thus the court advised the jury that to him, a *prima facie* case meant that the government had shown beyond a reasonable doubt that the defendant was guilty, and that if the judge did not consider that a *prima facie* case (*i.e.* a case proved beyond a reasonable doubt) had been made, he would direct a verdict.

At the close of the case the court did not direct a verdict. It thereby became apparent to the jury that the government had proved its case beyond a reasonable doubt. When the court permitted the jury to decide the case, the jury's function was clear. Unless it wanted to decide contrary to the decision of the trial judge, the jury was required to decide the case against the defendant. The jury performed its duty as required by the judge's early admonition.

We submit that the errors of which we complain here require review by this Court in the interest of the proper administration of federal criminal justice. We earnestly urge that the defendant was deprived of a fair trial in accordance with due process of law as that precept is laid down in *Krulewitch* v. *United States,* 336 U.S. 440, *Starr* v. *United States,* 153 U.S. 614; *Quercia* v. *United States,* 289 U.S. 466 and *Bihn* v. *United States,* 328 U.S. 633.

IV.

The trial judge erred in advising the jury the defendant could appeal a conviction, but that the government had no right of appeal.

Early in the trial the following took place:

"The Court: . . . I say what evidence you will hear . . . If I make a mistake on that that is not your responsibility. There is a higher court.

"The Government cannot appeal from your decision. A decision of twelve men and women in a jury on a criminal matter is final as far as the Government is concerned. The defendant can appeal . . .

"I tell you this to emphasize to you that you cannot decide this case on what you think should have been admitted as evidence. You must decide this case on the evidence that you hear that I say is good . . ." (R. 13).

[Following defendant's objection to the above (R. 14-15) the court advised the jury]:

". . . I mentioned the fact that your decision would be final, so far as the defendant is concerned, if he were found not guilty, that the Government has no right of appeal; but that the defendant had a right of appeal. I mentioned that by no means to indicate that you should in any way slight your duty, but rather that you should consider your duty more seriously in all respects because of the fact that in a civil case both sides have the right of appeal and your decision is not so near final as it is here. . . . you should . . . not assume 'Well, we'll reach a decision on this; if it is not right the court will set it aside or the defendant can appeal.'

". . . in all likelihood your verdict is going to be final, so . . . ignore the fact that one side can't appeal ...

"I assure you, I have never yet been reversed in a criminal case . . ." (R. 16).

When this error was raised in the Court of Appeals, the court took the position (Petition, appendix, page 40) that:

> "Seasoned defense counsel was apparently satisfied that the trial judge straightened out the situation and recorded no further objection."

We suggest to your Honors that defense counsel failed to interpose further objection to the court's attempted amelioration of the error previously committed because he desired to avoid receipt of another Trojan Horse.

In attempting to correct his original error, the court in fact amplified it. True, the court did tell the jury that the probability was that their verdict was final. Nevertheless, he repeated that the government had no right of appeal but that the defendant had such a right. His supposed corrective instruction still left the jury with the thought that narrow questions could be resolved in the government's favor because the defendant could appeal.

The only federal case we find is a lower court case, *United States* v. *Martel,* 104 Supp. 140 (Eastern District of Pa.) The district court in the *Martel* case, in reviewing its own conduct in deciding the motion for a new trial, stated, at p. 144 of its opinion, that juries are aware of courts of appeal in the federal system; hence his remark to the jury was harmless. The *Martel* case was reversed, *United States* v. *Martel,* 199 F. 2d 67, on other grounds. The point at issue here was not discussed by the Court of Appeals. However, the remarks in the case at bar went considerable beyond the remarks in the *Martel* case. Here the court not only advised the jury that the defendant can appeal if convicted, but that if the jury made a mistake as to the government by freeing the defendant, the government was all through.

We do find authority for our position that the judge committed reversible error in *People* v. *Silverman,* 252 App. Div. 149, 174, 297 N.Y.S. 449, 476; *Postell* v. *Commonwealth,* 174 Ky. 272, 283-4, 192 S.W. 39, 44; *Holt* v. *State,* 2 Ga. App. 383, 58 S. E. 511.

We respectfully submit that the statements of the trial judge to the jury deprived the defendant of a fair trial in accordance with due process of law.

• • • •

With regard to the last three points of this petition, dealing with the conduct of the trial judge in expressing his opinion upon the ultimate issue in the case, in informing the jury that were the case not proved beyond a reasonable doubt he would direct the verdict, and by his reference to the defendant's right of appeal, we respectfully submit this Court ought to grant Certiorari. The petitioner contends that he has been deprived of a fair trial in accordance with due process of law. He contends that he has been denied a trial by jury as that is generally understood, the crucial issues in the case having been removed from the ambit of the jury's possible determination by the remarks of the trial judge.

We respectfully submit that it is in the interest of the proper administration of federal criminal justice for this Court to grant review.

CONCLUSION.

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

FRANK W. OLIVER
Attorney for Petitioner

APPENDIX 1.

Before Finnegan, Swain and Schnackenberg, Circuit Judges.

Finnegan, Circuit Judge. A jury convicted defendant Morris under a conspiracy count in a three-count indictment which, in substance, charged Morris and Richard (Dixie) Richmond with unlawful possession of counterfeit $20 Federal Reserve Notes and intent to pass, utter, publish and sell. Count I charged these men with possession of one such $20 note, count II alleged possession in each of them of five thousand $20 notes, and count III, charged Morris and Richmond with conspiracy to pass, utter, publish and sell, with intent to defraud and with possession, with intent to defraud of $100,000 in counterfeit $20 notes. Found not guilty on counts I and II, Morris was sentenced to the custody of the Attorney General for 5 years on count III. Jury disagreements terminated two previous trials of Morris under this same indictment originally filed June 3, 1949. His co-defendant Richmond entered a guilty plea and received punishment of 10 years imprisonment.

In this appeal, defendant asks us to enter a judgment of acquittal because of (i) certain asserted erroneous rulings of evidence concerning acts, and declarations of an alleged conspirator in Morris' absence and because, it is urged, no proof *aliunde* of the conspiracy has been established, (ii) challenged instructions, (iii) the trial judge's remarks to jurors on *voir dire* examination and, (iv) refusal to allow defendant's motion for judgment of acquittal interposed at the close of all evidence and after the jury's verdict.

When reviewing this record mirrored against defense assignments of error, a marginal note once adopted by Judge Leahy comes to mind; "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with

pointed hats close together belongs to a darker age."[1] Indeed, there is an undisputed line of cases demonstrating that evidence of an express agreement among alleged co-conspirators is unnecessary. "It is seldom capable of proof by direct testimony and may be inferred from the things actually done. It is enough if the minds of the parties meet and unite in an understanding way with the single design to accomplish a common purpose, which may be established by circumstantial evidence or by deduction from facts from which the natural inference arises that the overt acts were in furtherance of a common design, intent and purpose." *United States* v. *Gordon,* 138 F. 2d 174, 176 (7th Cir. 1943). *Phelps* v. *United States,* 160 F. 2d 858, 867 (8th Cir. 1947) reflects yet another facet of this same reasoning: "Such a joining of intentions into a conspiracy may, and ordinarily only can, be established by inference from evidence of relationships and conduct and other probative circumstances."

From the evidence favorable to the Government, the jury could reasonably have believed that the following acts and events took place. A government informer, Jack Richter, was introduced to Morris by Bob Aldrich, a bookie, in February, 1949, at the Chicago Steak House in Los Angeles, California. Having said "hello" to Morris, the witness' testimony, related without objection, best describes what followed:

> "Q. Well, did Aldrich have a conversation with him in your presence?
>
> A. Yes. Aldrich told Mr. Morris that I was the man who was going to take the counterfeit money, and . . .
>
> A. Mr. Morris reminded him that any counterfeit money that was dealt in had to be dealt in $50,000 bundles." (T. R. 24).

---

[1] **Goldman Theaters v. Loew's Inc.,** 150 F. 2d 738, 743 (3rd Cir. 1945), note 15.

Several days before his initial introduction to Morris, Richter, Morris and Aldrich were sitting at a bar, Richter was seated next to Aldrich, one stool away from Morris, and Richter overheard and related this conversation from the witness chair:

> "Mr. Morris told Bob Aldrich that he had some counterfeit $10 bills, and asked him if he knew someone who wanted to buy them, or if Bob Aldrich wanted to handle them himself." (T. R. 25).

Richter further said that when he overheard that conversation the bartender and Dixie Richmond, co-defendant, were present. After his first meeting with Morris Richter had several conversations with Richmond. On April 15, 1949, Richter received government exhibits 1, 1A, and 2, consisting of the following envelopes, letter and a counterfeit $20 bill.

(Front)

"J. Richter
c/o Chicago Steak House
8th and Figuero 931 W. 8
Special Air Mail Los Angeles Calif."

(Back)

"M. Carson
2430 N. Clark
Chicago, Ill.
April 15, 49"

Exhibit 1A

"New Lawrence Hotel

Telephone Long Beach 1-2100

1020 Lawrence Avenue
Chicago 40, Illinois

Rick:

This is a sample price is up to $20 a hundred no less than a 100,000 at one time. I want this one back. Will call you Friday or Saturday.

Dix."

Richter took the letter and $20 note to Assistant Special Agent in Charge Victor D. Carli, Los Angeles Office, U.S. Secret Service. Richter, subsequently called Diversey 8-8142, and spoke with Richmond, several times, in Carli's presence. An oral stipulation between counsel for plaintiff and defendant, made part of this record established that Diversey 8-8142 is the number of the bar telephone, used by the public at the Tropical Nights, Inc., 2430 North Clark Street, Chicago, Illinois, an Illinois corporation of which Morris was one of the incorporators and president —up to the last report filed January 20, 1949.

On April 26, 1949, Agent Carli and Richter arrived in Chicago, and registered at the New Lawrence Hotel, Lawrence Avenue and Sheridan Road. A series of conversations were had with Richmond between April 26 and May 2, 1949, but the substance of these exchanges was not introduced by the government at this juncture. May 2, 1949 was the date on which Richmond went to the New Lawrence Hotel and met Richter and agent Carli. Richter testified that about 8 o'clock A.M., he observed Carli and Richmond leave the Hotel, enter the James Restaurant and thereafter Richter saw Morris enter that Restaurant. Agents Carli and Moore also observed this movement by Morris. Shortly thereafter Morris was seen leaving the James Restaurant followed, about five minutes later, by Carli and Richmond who returned to the Hotel where Richter had remained.

Richmond, Richter and Carli, then, went to the Hotel safe where Carli had put a package purporting to contain genuine currency in the sum of $30,000.[2] About 10 o'clock

[2] There is testimony to the effect that on the morning of May 2, 1949 Richmond went to the New Lawrence Hotel where Carli showed him $30,000 in lawful currency for the purchase of 5000 counterfeit twenty dollar bills from Richmond.

in the evening, of that same day, Richter met Richmond in front of the New Lawrence Hotel. Richmond arrived at that location as a passenger in a Veterans taxicab driven by government witness Steve Agenlian. Richter walked over to the cab where Richmond "frisked" him. Richter stated that he observed Morris seated in his (Morris') green Oldsmobile convertible, about a car-length behind that Veteran's taxicab. Corroboration on this point came from Secret Service Agents Cohen, Mroz and Boteler, all of whom testified for the government.

Traveling in Angenlian's taxi, Richter and Richmond went to a building which they entered, and then proceeded to a ninth floor room where they picked up a suitcase with $100,000 in counterfeit notes. Richter and Richmond then left the building through the Clarendon Avenue entrance; Richter was carrying the bag. The taxicab was waiting for them. According to Richter, Morris was following them in his car. Once again in the taxi, Richmond and Richter moved to the southwest corner of Wilson Avenue and Broadway where they left the cab and entered the "L" station. There, Richter selected a locker and deposited the bag. Agents McLaughlin and Goldman who were on duty in that station observed and corroborated the actions centering about the locker. Richmond pocketed the locker key.

A sidelight here, appears in Richter's testimony at the point where he said: "Well, we left the money and when we started out I asked him if we couldn't take another cab, and he asked me why, and I said, well, I had seen Mr. Morris walk over and talk with the cab driver. He told me, no that we would have to take the same cab."[3]

---

[3] A defense motion to strike the testimony quoted in text, was overruled (T. R. 247).

Several doors away from the "L" station, Richter called Carli at the latter's room in the New Lawrence Hotel. Then these two men proceeded, in the same taxi, to that Hotel and parked outside. According to Richter, he saw Morris parked right behind them in the green Oldsmobile and Richmond got out of the cab and said "something" to Morris. Testimony given by Agents Deckard and Mroz, on behalf of the government supplied corroboration on this point. Richmond thereafter rejoined Richter. About this time agent Carli emerged from the New Lawrence Hotel and proceeded along Lawrence Avenue. Then Agenlian's cab, followed by Morris in the Oldsmobile, moved across the intersection of Sheridan Road and Lawrence Avenue. As Agent Carli traveled along he was trailed, in turn, by agents Cohen and Mroz. Just east of Sheridan Road—on the south side of Lawrence Avenue, Harry D. Anheier (the Special Agent-in-charge, U.S. Secret Service in Chicago, who also testified below) and Agent Boteler moved toward the taxicab. Carli reached Agenlian's vehicle and engaged Richmond and Richter in conversation. Agents Anheier and Boteler approached the taxi from its rear; when Boteler identified himself, Richmond made a quick move toward his pocket and Boteler shot him in the forehead.

Just about the time of this shooting the green Oldsmobile approached and then passed the halted cab. Agents Anheier, Boteler and Carli identified Morris as the man each of them observed in the Oldsmobile. Ordered to stop or be shot, by Boteler, Morris stopped and was arrested.

Using the locker key agents took the bag from the locker which had been under constant surveillance by other agents.

George LeCuyer, manager of the Chicago Steak House, testified that he observed Morris, Richmond, Richter, and Aldrich in conversations together during February and March, 1949 at the House.

Taking the stand in his own defense Morris testified that he had known Richmond since 1944, but when he (Morris) went to California he did not know Richmond was there. But Morris stated that LeCuyer told him a Mr. Richmond had been inquiring about Morris.

When accounting for his own presence at the various and sundry points in Chicago, just related, Morris testified Richmond owed him a "couple of hundred dollars" for a year or two and on the evening in question he (Morris) was moving from point to point with Richmond because the latter, having promised to repay that loan told Morris to meet him, once they met, Richmond was shortly going to pay Morris, hence the latter was simply waiting on the debtor Richmond that May evening. On cross-examination Morris testified that he flew back to Chicago from California and Richmond drove Morris' car from California to Chicago, for which Richmond received $75.00 or $100. Morris denied talking about counterfeit money or having ever seen Richter before his court appearance in January, 1950.

George Anders, testifying for the defense related his meeting with Morris at about 11 o'clock, May 2, 1949, saying further that he and Morris remained together until about 9—9:30 that evening. Anders also testified that Morris told him he had a 10 o'clock appointment.

This record reflects evidence of conversations between agent Carli and Richmond about: ten dollar counterfeit notes, two cashier's checks for $22,000 and $10,000, respectively drawn on the Bank of America, payable to John Rosellini (a name used by Carli for this affair). Agent Carli also testified that he listened to toll calls between Richter and Richmond, moreover Carli related the plans he laid out with Richmond to use the Wilson Avenue "L" station locker—which crystallized the events of May 2, 1949.

Our narration of certain facts is only intended to present an overview of the evidence reflected by this record. We have presented it in even more detail, perhaps than is necessary to dispose of the appeal. Yet enough is reported, we think, to show the basis for our holding that the defense motions were correctly denied. *United States* v. *Aman,* 210 F. 2d 344 (7th Cir. 1954); *United States* v. *Yeoman-Henderson, Inc.,* 193 F. 2d 868 (7th Cir. 1952). Nor is it necessary to extract each piece of testimony against which defense counsel lodged an objection, in order to dispose of Morris' basic contention resting upon the evidentiary aspect of this appeal. Actually defense counsel is recorded as having preserved a standing objection to lines of inquiry by government counsel which defendant contended were pursued before a conspiracy between Morris and Richmond was established.

Conspirators seldom sign articles of partnership in crime which may thereafter be conveniently put into evidence by the prosecution. *United States* v. *Crowe,* 188 F. 2d 209, 212 (7th Cir. 1951). "Overt acts of the parties" it was pointed out in the *Crowe* case, "may be considered with other evidence and attending circumstances in determining whether a conspiracy exists, and where the overt acts are of a character which are usually, if not necessarily done pursuant to a previous scheme and plan, proof of the acts has a tendency to show such preexisting conspiracy, so that when proven they may be considered as evidence of the conspiracy charged . . . (citing) . . . ." (id. 213).

Commencing with the first confrontation by Morris of Richmond in California and continuing to the climax of gun-play in Chicago, it is clear that a jury could find Morris' presence here and there in the mosaic of events was hardly ascribable to accidental isolated phenomena. It is

curious that a debtor would invite his creditor to follow him (Richmond) around while the debtor busily engaged in committing a felony. In our opinion independent evidence against Morris had been adduced, below, prior to the government's offer of Richmond's statements about which defendant complains. We think Mr. Justice Minton cogently summarized the basic principles applicable here, when delivering the majority opinion in *Lutwak* v. *United States,* 344 U.S. 604, 617 (1953):

> ". . . . Declarations of one conspirator may be used against the other conspirator *not present* on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party . . . ." (Italics added.)

At bar the district judge first permitted Richter to tesify about the *acts* of Richmond, but not conversations. But Richter had already repeated several statements uttered by Morris pertaining to counterfeit bills. Testimony describing Richmond's statement followed later in the trial. We think Morris had been linked sufficiently with Richter and Richmond so that the trial judge's discretion was unabused when he permitted introduction of the acts and declarations against which defendant levels his challenge. *United States* v. *Von Clemm,* 136 F. 2d 968, 971 (2nd Cir. 1943).

Whatever intimations defendant envisages this Court as having made in *United States* v. *Moloney,* 200 F. 2d 344, 346 (7th Cir. 1952), the case is unavailing here on Morris' contention that the jury returned inconsistent verdicts. We recognized the value of *United States* v. *Bazzell,* 187 F. 2d 878 (7th Cir. 1951) in our *Moloney* opinion and apply it here.

Careful consideration of those remarks, challenged here by defendant, made to jurors by the district judge during the *voir dire* examinations has shown us there is absent any sound reason for overturning the jury's verdict. Seasoned defense counsel was apparently satisfied that the trial judge straightened out the situation and recorded no further objection. *United States* v. *Kirby,* 176 F. 2d 101 (2nd Cir. 1949).

Some of the instructions attacked by the defense refer to the counts on which Morris was found not guilty. From the colloquy reported in this record it is quite clear that the matter of instructions received considerable attention. We say that defense counsel's generalized objection to the trial court's illustration of circumstantial evidence by reference to "snow falling during the night" melts away under Rule 30, Fed. Rules Crim. Proc., 18 U.S.C.A.

Nor does defendant's contention springing from the government's rebuttal evidence warrant disturbing this verdict. Indeed, after examining all of the various points urged upon us by defendant we found they were similarly insubstantial and without merit.

Because of the final argument sponsored by the defendant in the concluding part of his brief we point out that on page 252, transcript of record, Richter under redirect examination testified that he went to see Agent Carli *after* he overheard the conversation between Aldrich and Morris. On page 27-28 of the defendant's brief it is urged, *inter alia* that Richter ". . . had communicated with Agent Carli before he ever *saw* this defendant," and we are cited to "Tr. 249" in support. But page 249 reveals that defense counsel interrogated Richter about seeing Agent

Carli before Richter "*met*" or was "introduced" to Morris. Jury verdicts are not annulled by such semantic jugglery.

Finding no reversible error in this record, the judgment is affirmed.

Affirmed.

APPENDIX 2.

Statute Involved.

Title 18, U.S. Code.

"Sec. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined nor more than $10,000 or imprisoned not more than five years, or both. . . ."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 431

IRVING E. MORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1, pp. 31–41) is reported at 225 F. 2d 91.

JURISDICTION

The judgment of the Court of Appeals was entered July 28, 1955. A petition for rehearing was denied August 30, 1955. The petition for a writ of certiorari was filed September 29, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge invaded the province of the jury in explaining to the jury his rulings on the admissibility of declarations of a co-conspirator.

2. Whether the court's statement on the *voir dire* that it would be compelled to direct a verdict of acquittal if the evidence did not establish a prima facie case, considered together with its action in not directing a verdict, deprived petitioner of a fair trial.

3. Whether the judge's statement on the *voir dire* that the defendant had a right of appeal, and the government did not, constituted reversible error, where he later instructed the jurors to ignore the factor of appeal in reaching their verdict.

STATEMENT

Petitioner and "Dixie" Richmond were indicted on three counts, counts one and two for possession of counterfeit notes, and count three for engaging in a conspiracy to possess and sell counterfeit notes (R. 3–8). Richmond entered a guilty plea and received a sentence of 10 years imprisonment (See C. A. Op., Pet. App. 1, p. 31). A jury found petitioner guilty on the conspiracy count (R. 362) and he received a sentence of five years imprisonment (R. 363).[1] On appeal, the conviction was affirmed (Pet. App. 1, pp. 31–41).

[1] Two previous trials on the same indictment ended in jury disagreements. (See C. A. Op., Pet. App. 1, p. 31.)

On the *voir dire* examination of the jurors, the court explained that they were the judges and he was in effect a legal advisor who would decide what evidence they should hear and tell them what principles of law to apply. In emphasizing that they should rely upon his decisions as to the admissibility of evidence, he pointed out that his mistakes should not concern them since the defendant could bring the question before a higher court. He noted that the government did not have this right of appeal. (R. 12–13.) Upon suggestion by counsel that the prospective jurors might have acquired the wrong idea from mention of the fact that the defendant could appeal, the court promised to straighten out any such possible impression (R. 14–15). This he did in the following language (R. 16):

> The COURT: I think in asking some questions I mentioned the fact that your decision would be final, so far as the defendant is concerned, if he were found not guilty, that the Government has no right of appeal; but that the defendant had a right of appeal. I mentioned that by no means to indicate that you should in any way slight your duty, but rather that you should consider your duty more seriously in all respects because of the fact that in a civil case both sides have the right of appeal and your decision is not so near final as it is here. Your responsibility is greater, and you should most certainly not assume,

"Well, we'll reach a decision on this; if it is not right the court will set it aside or the defendant can appeal."

I mention it to impress upon you the seriousness, that in all likelihood your decision, in all likelihood—there are some times appeals are granted—but in all likelihood if you find the defendant, if you should find the defendant guilty, in all likelihood and almost I would say nine chances out of ten or more, that will be the final verdict. I want you to know that in all likelihood your verdict is going to be final, so you should give every consideration before you render a verdict, and ignore the fact that one side can't appeal and think that maybe you can render a decision and the other side can appeal.

I assure you, I have never yet been reversed in a criminal case; I have in a good many civil cases. I will try my best to see that this case is tried fairly. So the chances are, again I say to you, that your verdict is likely to be final. So you must take it seriously and realize that if you find this man guilty he is likely to remain found guilty.

The government's evidence of the conspiracy and petitioner's part in it may be summarized as follows:

Richter, who appeared for the government, testified that he overheard a conversation between petitioner, Aldrich, and Dixie Richmond, the alleged co-conspirator, in which petitioner told

Aldrich he had some counterfeit bills and asked if he knew of someone who wanted to buy them, or if he wanted to handle them himself (R. 25–26). Aldrich indicated he did not want to be involved (R. 25). Richter further testified that he was introduced to petitioner by Aldrich at a bar in Los Angeles (R. 24) at which time Aldrich told petitioner that Richter was the man who was going to take the counterfeit money (R. 24) and petitioner reminded Aldrich that the counterfeit money had to be dealt in in $50,000 bundles (R. 24).

Richter identified a counterfeit bill received by him through the mails in Los Angeles on April 15, 1949 and stated that he took it to agent Carli of the United States Secret Service (R. 27–29). He and Carli exchanged some phone calls with Richmond then in Chicago (R. 29). The telephone number used by Richmond was that of a telephone located in a Chicago tavern owned by petitioner (R. 107).

Richter and Carli met Richmond in Chicago (R. 31). On May 2, 1949, Richter saw petitioner emerging from a restaurant in which Richmond and Carli were having coffee (R. 30–31). Carli noticed petitioner observing him at the restaurant (R. 194). On the night of May 2, Richter entered a cab with Richmond and noticed that petitioner followed them in his car while he and Richmond stopped twice first to pick up a bag of counterfeit money and then to check it in a public locker (R.

33–40). The cab returned to Richter's hotel at which time Richmond got out and spoke to petitioner (R. 42). The cab then drove off with Richter and Richmond, and shortly thereafter the cab was stopped and Richmond was arrested (R. 43). Petitioner, who had continued to follow the cab, then attempted to pass the cab, but his car also was stopped and petitioner was arrested (R. 44).

The above foundational evidence of a conspiracy and petitioner's part in it having been presented, Carli and Richter were allowed to testify to their conversations with Richmond, the alleged co-conspirator (R. 195–209, 233–247). This testimony was to the effect that in Los Angeles Richmond told Richter that he, Richmond, would deal with him with respect to the counterfeit notes; that Richmond called Richter from Chicago to say he was sending a sample (R. 241–243); and that thereafter details were arranged for the sale of the notes to Carli, posing as Richter's contact (R. 195–209, 246). The only mention of petitioner in these conversations was to the effect that Richter stated that, on the night of May 2, after he and Richmond had checked the money, he suggested to Richmond that they take another cab because he had seen petitioner talk with the cab driver (R. 247).

When Richter first testified, and said that he had a conversation with Richmond, the judge

sustained an objection to any testimony as to the contents of the conversation (R. 27). He explained his action to the jury as follows (R. 27);

> The COURT: The jury will understand that no person can be bound by statements of another person out of his presence, where he had nothing to do with it, unless there is first evidence presented that some kind of an agency existed. For instance, if a man has hired somebody to do something, or a conspiracy, or some evidence to show that there would be some authority, that he would have some right to speak, or that they were engaged in the same type of conspiracy.

Subsequently, after the judge had excluded testimony as to a conversation between Carli and Richter on the ground that they were not conspirators, he said (R. 191):

> The COURT: I know the jury may be confused about refusing sometimes to let conversations go into the record, and that sometimes I do. We have had that out now, conversations between certain persons where sufficient evidence has been shown to show some form of agency, you will be permitted to hear that, but there is no charge of any agency or anything like that or conspiracy between that particular man Richter and the defendant. So you can't

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> bind somebody with a conversation with somebody where there isn't any relationship established. You couldn't bind them with a conversation between me and them in this case, for instance, unless you show I had some agency relationship.

When Richter was recalled to testify to his conversations with Richmond, the court, in overruling defense counsel's objection, stated (R. 235):

> The COURT: It is understood that the right was reserved to recall this witness specifically for such questions and answers, and counsel has now made an objection to each and every question and answer, to the asking of each and every question, and to the answer thereto, on the grounds as set forth.
>
> The court overrules the objection, the court having heretofore ruled on a similar objection in the same manner, for the reason that there has been tendered certain evidence that the jury might, has a right to take into consideration, and that it is for the jury to decide whether the other evidence amounts to, sufficient to consider whether there has or has not been a conspiracy proved.
>
> With that evidence already in the record it is up to the jury to believe or not believe the evidence that has been presented.

After further argument outside the presence of the jury (R. 236–238), the judge addressed the jury as follows (R. 239):

> The COURT: Ladies and gentlemen of the jury, the questions which you will hear, and the answers thereto, have been objected to, and the objections have been overruled. You will hear the questions and the answers, and they will be binding upon the defendant as to count 3. * * *
>
> The third count is that he did conspire with this man Richmond. The court has ruled that these conversations may be heard and shall apply to and be evidence in connection with count 3 only. With that in mind you may proceed.[2]

On the suggestion of defense counsel that "admissible" was a better word than "binding" the court agreed, stating (R. 239–240):

> The COURT: They may be admitted. It is for you to determine, of course, whether they are binding or not. It isn't for the court to determine, but they may apply, or be admitted, is a better term—I do not mean and I do not want you to understand—I do not mean by any reason say that they are binding. That is for you to decide whether they are binding or not.
>
> They will be binding if you find they were made, but you will be the persons to find whether they were actually made or not. That will be the point. * * *

In overruling another objection, the court said (R. 243):

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[2] The judge subsequently ruled that the evidence was admissible on other counts as well (R. 342).

> The COURT: Objection overruled. It is for the jury to determine the whole conversation, whether or not it took place and whether or not it applied to the defendant Morris.
>
> There has been evidence presented and it is up to the jury to believe whether or not there was a conspiracy existing between Richmond and the defendant.
>
> You heard the testimony. It is up to you to believe it and, of course, in order for you to get the story you must hear all the conversation that Richmond has had concerning anything relating to this particular act.

In his final charge, the judge included the following instruction relative to declarations of a co-conspirator (R. 355):

> During the course of the trial, declarations, statements and conversations of one of the defendants, made out of the presence of the other defendant, have been admitted in evidence. The court charges you that the declarations, statements and conversations of one defendant, made out of the presence of the other defandant, is not binding upon such other defendant unless such other defendant is shown by the evidence beyond a reasonable doubt to have been a participant in the conspiracy charged in this indictment and unless, further, the declaration, statements or conversations were in furtherance of the alleged joint enterprise and made during its continuance.

ARGUMENT

This case presents no question of law of importance nor any conflict of decisions. The court below correctly affirmed the conviction of petitioner.

1. Petitioner contends (Br. 9–24) that the judge's comments to the jury with respect to the admissibility of co-conspirator Richmond's conversations with the government witnesses in effect directed the jury to find petitioner guilty of conspiracy. The judge, of course, before admitting such evidence, had to make a preliminary ruling to the effect that there was sufficient evidence of a conspiracy to justify the admission of declarations made in the course thereof. It was proper for the judge to indicate to the jury the reasons for his rulings on the admissibility or exclusion of evidence, so as to avoid misunderstandings. Not every such incidental comment by the court was a complete and exact statement of the law on the subject. But as we argue in more detail below, his remarks, when considered in context, could not have misled the jury. And in his final instructions, the judge gave full and correct instructions not only on the consideration to be given to declarations of a co-conspirator (R. 355), but on reasonable doubt (R. 348–349), the presumption of innocence (R. 351), the necessity for proof of agreement beyond mere knowledge of illegal acts (R. 353–354), and the weight

to be given to circumstantial evidence (R. 355–356). It thus becomes evident that petitioner's attempt to pick apart incidental remarks of the trial court in ruling on the admissibility of evidence is an attempt to magnify on appeal instances which were of little importance in their trial setting. See *Glasser* v. *United States,* 315 U. S. 60, 83.[3]

Petitioner argues (Pet. 9–10) that the judge's remark at R. 27 (quoted at p. 7, *supra*) was incorrect in that the judge said that before a man could be bound by statements outside his presence there would have to be some kind of agency, or evidence "that they were engaged in the same type of conspiracy." This last remark, admittedly inaccurate, was made early in the trial when the judge was excluding, not admitting, evidence. It was not objected to at the time. Similarly the remark at R. 191, quoted *supra,* pp. 7–8, which petitioner asserts was a ruling that sufficient evidence of conspiracy had been shown (Pet. 11), was actually a ruling that the evidence was inadmissible because the person making it was not charged as a co-conspirator. This remark too was not objected to at the time.

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[3] These incidental remarks by the trial judge cannot be compared to the erroneous cursory instruction given to the jury in *Bollenbach* v. *United States*, 326 U. S. 607, after it had reported itself hopelessly deadlocked, or to the lack of proper final instructions in *Nicola* v. *United States*, 72 F. 2d 780 (C. A. 3) (see Pet. 21).

When the judge did finally admit testimony of conversations with co-conspirator Richmond, he prefaced his ruling with the statement that "there has been tendered certain evidence that the jury might, has a right to take into consideration, that it is for the jury to decide whether the other evidence amounts to, sufficient to consider whether there has or has not been a conspiracy proved" (R. 235). Thereafter he made the remarks at R. 239, quoted *supra,* pp. 8–9, saying that the statements were binding upon petitioner, if the jury believed them to have been made. (At the suggestion of counsel, the judge promptly corrected himself to say that the statements would be "admitted" against petitioner.) Petitioner complains (Pet. 12–22) that at this point the judge did not make it clear that the remarks would be admissible against petitioner only if there were proof that petitioner was a conspirator and if the remarks were made in the course of the conspiracy and in furtherance thereof. But, as noted, the judge had just said that the evidence was admissible because there was evidence from which the jury could find a conspiracy (R. 235). And very shortly thereafter, at R. 243, quoted *supra,* pp. 9–10, the judge again made it clear that it was for the jury first to determine whether there was a conspiracy between Richmond and petitioner. And finally, there is the fact that, when the case was submitted to the jury, the charge on the admissibility of the declarations

(R. 355), as petitioner concedes (Pet. 19), correctly covered all aspects of the question.[4]

The whole issue with respect to the admission of the declarations of a co-conspirator has, in relation to the facts of this case, none of the significance which petitioner would attach to it. The declarations to which the witnesses testified did not mention petitioner at all except for the fact, otherwise proved, that petitioner followed Richmond and the government agents on the night of September 2. What the declarations tended to show was the arrangements for and the passing of the counterfeit money, *i. e.*, that the substantive offenses had occurred. Petitioner was, however, acquitted of the substantive offenses.

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[4] Although admitting that the judge's final instructions were correct (Pet. 19), petitioner asserts that there is a conflict in the federal courts as to the function of judge and jury in relation to such evidence which this Court should resolve. There is no conflict on the issue here involved. The instructions here meet in full the requirements of *Glasser* v. *United States*, 315 U. S. 60, 73–74.

In *United States* v. *Dennis*, 183 F. 2d 201, 230–231 (C. A. 2), cited by petitioner (Pet. 20–21), Judge Hand suggested that an instruction that declarations of co-conspirators could not be considered against a defendant for any purpose until there was proof of his participation in a conspiracy was too favorable to a defendant since the declarations might establish the existence of a conspiracy, whether or not a particular defendant was shown to be part of such conspiracy. No such issue is presented here since the instructions (R. 355) required the jury to find that a conspiracy existed before considering against petitioner declarations of co-conspirator Richmond.

2. The fact that the court failed to direct a verdict of not guilty at the close of the case did not lead the jury to infer that the government had proved its case beyond a reasonable doubt because of language used by the court in its *voir dire* examination of the jurors. To refute petitioner's argument (Pet. 25–26), we need only cite in full the comment of the court (R. 13–14) from which petitioner urges such inference to have arisen:

> The COURT: The responsibility is on the Government to find him guilty,[5] and if the evidence does not show him guilty beyond a reasonable doubt then they would find the defendant not guilty. That is the proper question, because the defendant is under no obligation to testify or to present any evidence of not being guilty. He has a right to present evidence to contradict evidence that is in, but he is under no obligation to prove himself not guilty. The Government must make a prima facie case at least, must show beyond a reasonable doubt that he is guilty, because if there was not evidence that the court considered prima facie case I would be compelled to direct a verdict.
>
> At this time I think it is proper for me to ask this question: Are each of you willing to abide the instructions of the court, even

[5] The slip of the tongue by which the judge said "find" instead of "prove" certainly could not, as petitioner argues (Pet. 25), have been misleading.

though it might so far as to direct a verdict, if I should find that there is an absence of testimony, an utter absence of sufficient testimony to find the defendant guilty? Under those circumstances it might become my duty to direct you to return a verdict of not guilty. Would each of you do so, if I should so direct? Would each of you so do? And would each of you so do?

In a criminal case I don't believe there would be a case where I would have authority to direct a jury to return a verdict of guilty. I believe the question of guilt would still be a question of fact for the jury to decide. It is only in the absence of proof where I would have the authority to direct a verdict.

The most that can be inferred from such language and the failure to direct a verdict is that the government had presented a prima facie case. That is always the situation when a judge overrules a motion for acquittal. If it constitutes a comment on the evidence at all, it falls within the area of permissible comment. Cf. *Quercia* v. *United States,* 289 U. S. 466, 470. Here the judge, throughout the trial, made it clear that the issues of fact were for the jury to decide (see, e. g., R. 243, 343) and in submitting the case to the jury gave full instructions on all aspects of the case. The fact that petitioner was acquitted on two counts submitted to the jury fur-

ther demonstrates the insubstantiality of petitioner's contention.

3. Petitioner's argument (Pet. 27–29) that the comment of the judge on the *voir dire* examination of the jurors (R. 13) that any mistakes he made in ruling on the admissibility of the evidence could be appealed by the defendant deprived him of a fair trial is equally insubstantial. After defense counsel questioned the possible effect of this statement on the jury (R. 14–15), the court sought to impress on the jurors the seriousness of their decision, the fact that in all probability their verdict would be final, and that they should not be influenced by the fact that one side can't appeal. As noted by the Court of Appeals (C. A. Op., Pet. App. 1, p. 40), this further statement apparently satisfied seasoned defense counsel who recorded no further objection.

A similar situation arose in *United States* v. *Martel*, 104 F. Supp. 140, 144 (E. D. Pa.), reversed on other grounds, 199 F. 2d 670 (C. A. 3), when the court in instructing the jury said that if it were in error as to the law it could be corrected by another court. The court noted in overruling a motion to set aside a verdict:

> Jurors are well aware of the existence of federal appellate courts even in the absence of a specific allusion to them by the Court. The average layman tends to be very conscious of the right of appeal from an

adverse determination in a court of first instance.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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OCTOBER 1955.

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[6] Two of the state cases cited by petitioner to the contrary (Pet. 29) involved more aggravating conditions. In *Holt* v. *State*, 2 Ga. App. 383, 58 S. E. 511, the court made a forceful statement in the midst of cross examination by defense counsel: "I may be wrong about this. You have your remedy. You can go to the Supreme Court." In *Postell* v. *Commonwealth*, 174 Ky. 272, 283–284, 192 S. W. 39, 44, the court told the jury that a prisoner under life sentence would be subject to parole in answer to their query while they were considering the case, and after which response they returned a death sentence. Just how the comment in the other state case cited by petitioner, *People* v. *Silverman*, 252 App. Div. 149, 174, 297 N. Y. S. 449, 476, arose is not clear from the report of the case.

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PETITIONER'S REPLY TO BRIEF OF UNITED STATES.

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PETITIONER'S REPLY TO BRIEF OF UNITED STATES.

The petitioner replies herewith to the points as they appear in the government's answer.

STATEMENT OF FACTS.

The government's statement of facts (Gov't. Br. 2-10) is not, we think, unreasonable, although it adds little or nothing to the facts as stated in our brief. We do disagree with the assertion (Gov't. Br. 4) that Richter testified he overheard a conversation between petitioner Morris, Aldrich, and Dixie Richmond the alleged co-conspirator, the testimony being instead that Richmond was merely present at the same bar, but it does not appear that he was a party to any transaction that allegedly transpired then between Aldrich and Morris (R. 25-26).

I.

The judge confused the jury with his remarks regarding declarations of alleged co-conspirators in conspiracy cases and in effect directed a verdict against the petitioner (Gov't. Br. 11-14, Pet. 9-23).

The government's answer to our petition is in the nature of a confession and avoidance.

We agree with the government that it was appropriate for the trial judge to rule on the admissibility of evidence (Gov't. Br. 11) but we question the soundness of the government's contention that it was proper for the judge to indicate to the jury his reasons for his rulings "so as to avoid misunderstandings" (Gov't. Br. 11). We contend that the judge's remarks did not have the effect of avoiding, but rather the effect of creating misunderstandings.

The government seems to go along with our view as to the initial impropriety of the judge's comments, *e.g.*:

> "Not every such . . . comment . . . was [an] . . . exact statement of the law . . ." (Gov't. Br. 11)

"This last remark, admittedly inaccurate, was made . . . when the judge . . ." (Gov't. Br. 12).

". . . The judge promptly corrected himself . . ." (Gov't. Br. 13).

"The slip of the tongue by which the judge said . . ." (Gov't. Br. 15, n. 5).

The government relies on the bromide that the trial court having finally instructed properly at the conclusion of the case, petitioner was not really injured by what the government is constrained to call the court's "incidental remarks" (Gov't. Br. 11-12).

But we object that the trial was erroneously encumbered with inaccurate, misleading and prejudicial comments by the trial court. The government charges us with "picking apart" the record (Gov't. Br. 12). We venture to suggest that if your Honors were to thumb the record at random, you would observe a case extraordinary for the amount of incidental, unnecessary and inaccurate comment by the trial judge.

The government seeks to avoid the effect of one remark on the ground that, although inaccurate, it occurred early in the trial, when the judge was excluding, and not admitting evidence (Gov't. Br. 12). The comment in question sought to bind petitioner with declarations of individuals not in the *same* conspiracy, but in the same *kind* of conspiracy (R. 27). If the trial court misleads the jury, we fail to see what possible difference it could make as to whether he were admitting or excluding evidence at the time.

The government suggests (Gov't. Br. 12) that because another remark by the court (R. 191) was directed in part to the fact that a conspiracy did *not* exist between petitioner and Richter (a government witness) the jury could just walk away from that part of his remark which indicated that he, the judge, had already decided that a con-

spiracy had existed between petitioner and Richmond, his alleged co-conspirator.

The government says that we ought not complain of the judge's remark that statements of an alleged co-conspirator would be binding on petitioner merely if they were made (R. 239, Gov't. Br. 13) because four record pages previous to that remark, the judge told the jury that it was for them to decide whether certain evidence was sufficient to prove a conspiracy. But if this Court will examine those previous remarks of the trial judge (R. 235) extracted by the government (Gov't. Br. 13), the court will observe that the remarks of the trial judge at p. 235 of the Record are hopelessly confusing. He tells the jury that it ". . . might, has a right . . ." to consider "certain" evidence and it is for the jury to decide whether the unidentified "other" evidence has a certain effect. The trial court's remarks which the government contends are palliative of the error at R. 239 are so confused and confusing as to require correction themselves. But in no event do they cure the error of which we complain, *viz.*, that the jury was instructed to bind petitioner with remarks of his co-defendant, merely if they were made (R. 239).

Again, the government relies upon the supposed effect of the court's remarks at R. 243 as curative of this error (Gov't. Br. 13). There the court stated that it was for the jury to determine the effect of certain testimony, and in the course of his statement, advised the jury:

> "You heard the testimony. It is up to you to believe it. . . ." (R. 243).

The government sets out (Gov't. Br. 10, top) what it maintains (Gov't. Br. 13) to have been a statement by the judge which cured the prior error. But again, the supposedly remedial remarks were themselves erroneous. Government witness Richter was testifying to an alleged long distance tele-

phone conversation with one Richmond, in which Richmond said he had sent the witness a sample of counterfeit. (R. 242). The court, upon objection, ruled that it was a question for the jury whether or not the conversation took place, and whether or not it applied to the petitioner. But the jury was erroneously not further advised that the conversation could apply to the petitioner only if it were during and in furtherance of a conspiracy in which both Richter and petitioner were members. Thus as the instruction was given, the jury was, at that time, free to believe that they could apply or not apply the testimony to the petitioner within their uncontrolled discretion.

The government admits (Gov't. Br. 11) that not all the judge's incidental comments were complete and exact statements of the law. We complain that they were so numerous, so incomplete, and so inexact that the jury must assuredly have been circumscribed by utter confusion while listening to the testimony. The government apparently contends that although the judge gave befuddling misstatements of law throughout the trial, the correct instructions given at the termination thereof constituted a sufficient guide to lead the jury through the maze the judge previously had sponsored.

The government contends (Gov't. Br. 14) that petitioner ought not complain of the effect of statements of his alleged co-conspirator out of his presence because he was not mentioned by name in those statements. Accordingly, says the government, all that the declarations tended to show were "the arrangements for and the passing of the counterfeit money, *i.e.* that the substantive offenses had occurred." We think it is a complete answer to observe that part of the *corpus delicti* of the conspiracy was thus demonstrated by the hearsay declarations, *i.e.*, that the *object* of the supposed conspiracy was illegal, as required

in order to be violative of Section 371, Title 18, U.S. Code. Furthermore, the court did not instruct the jury that the declarations could only be considered as to the substantive offenses, and, if the court had so instructed the jury, it would have been patent error. In short, the declarations affected the conspiracy count of which petitioner stood accused, and the jury ought not improperly to have been advised of their application throughout the trial.

II.

The trial judge advised the jury that should he permit them to decide the case, it was because he had determined the defendant's guilt beyond a reasonable doubt. (Gov't. Br. 15-16, Pet. 25-26).

The government sets out certain language of the trial court at pp. 15 and 16 of its brief and states that:

> "The most that can be inferred from such language and the failure to direct a verdict is that the government had presented a prima facie case," (Gov't. Br. 16).

But the government totally overlooks the fact that in the first paragraph of the quoted portion (Gov't. Br. 15, R. 14), the court told the jury that to him, the trial judge, the words "*prima facie* case" signified a case proved beyond a reasonable doubt. The government admits (Gov't. Br. 16) that the judge's language, together with his failure to direct a verdict, indicated to the jury that the government had proved a *prima facie* case. But taken with the judge's statement that a *prima facie* case is a case proved beyond a reasonable doubt (R. 14, Pet. 26) we can only arrive at the inference that when the judge let the case go to the jury, he in effect told the jury that in his opinion the government had established its case beyond a reasonable doubt.

III.

The trial judge erroneously advised the jury that the defendant alone could appeal from its verdict (Gov't. Br. 17-18, Pet. 27-29).

The government contends that the court corrected his previous error in advising the jury of the fact that the government could not appeal from the jury's verdict, by his subsequent remarks (R. 16).

The court punctuated those remarks with his assurance to the jury that he had never been reversed in a criminal case (R. 16). He previously had told the jury that he could direct a verdict in favor of the defendant (R. 14) but that a *prima facie* case, *i.e.*, one which he permitted the jury to act upon, was to him, the judge, a case proved beyond a reasonable doubt (R. 13-14).

Thus these prophylactic utterances told the jurors that whenever the trial judge had let juries in other cases decide the issues he had been right in his appraisal. That is, whenever he had let a case go to the jury, the defendant was really guilty; witness his record on appeal.

United States v. *Martel,* 104 F. Supp. 140, cited by the government (Br. 17) was, as we observed in our petition (Pet. 28) different from the case here. In the *Martel* case, the judge did not emphasize, or even allude to the fact that the defendant could appeal *while the government had no such right.* Thus the government's quotation from that case has no relevance to this appeal.

CONCLUSION.

The government gratuitously advises the Court that the petition presents no important question of law nor any conflict of decisions (Gov't. Br. 11). We respectfully urge that the decision of the Court of Appeals for the Seventh Circuit is in serious conflict with the decisions of this Court and with the courts of other circuits as noted in our petition. We further urge that the fact that eminent judges are driven to admit that the proper application of evidence upon matters basic to conspiracy prosecutions "is not clear in the books" (*United States* v. *Dennis*, 183 F. 2d 201, 230), belies the government's contention that nothing of importance is raised by our petition.

We respectfully submit that the petitioner was deprived of a fair trial, in accordance with due process of law, that the trial judge in effect deprived the petitioner of a trial by jury by taking certain jury questions away from the decision of the jury, and by expressing his opinion on ultimate issues of the case; that a number of the questions here are novel and important in the administration of criminal justice in the Federal Courts; and that, therefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK W. OLIVER,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 431

IRVING E. MORRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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ON PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner Irving E. Morris, respectfully prays that this Court rehear the Petition for a Writ of Certiorari denied by the court.

Reasons Why The Petition For Rehearing Should Be Granted.

Mindful of Rule 58 of the rules of this Court limiting the grounds upon which we properly may petition the Court for rehearing, we represent to the Court that substantial grounds exist for reversal of the Court of Appeals and the Trial Court herein, not previously brought to this Court's attention.

In our Petition for Certiorari, since denied, we underscored the fact that throughout the trial, declarations of petitioner's alleged co-conspirator were erroneously admitted as to him and applied to him.

In the original Petition for Certiorari we did not allude to the error of which we now complain, *viz.*, that the *acts* of petitioner's supposed co-conspirator were permitted to be considered by the jury without a prophylactic admonition by the trial court that such acts might not bind nor affect petitioner without proof *dehors* those acts that petitioner was then (1) a member of (2) an existing conspiracy.

We now address that further complaint to the Court. If the Court will refer to the Record at pages 37-38, it will find expressed there the mistaken view, sponsored by the trial judge, that while *declarations* of alleged conspirators might not be considered against their supposed co-conspirators, *acts* could be so considered.

Complaint was made to the introduction of evidence concerning the acts of petitioner's alleged co-conspirator (R. 37). It was based upon the ground that the *acts* of that co-conspirator could not establish the existence of a conspiracy as against the petitioner who was absent when the acts were performed. The court overruled the objection (R. 38).

Both declarations *and* acts of one conspirator are uniformly held to be unavailable to establish the existence of a conspiracy as to one then absent. In *May* v. *United States*, D.C. Cir., 175 F. 2d 994, 1008-9 (1949) the court held:

> "The rules are that one defendant's connection with a conspiracy cannot be established by the acts or declarations of *other* defendants in his absence, and that a defendant cannot be bound by the acts and declarations of other defendants until (a) the conspiracy has been established and (b) the defendant's participation in the conspiracy has been established."

In *Bartlett* v. *United States*, 10 Cir. 166 F. 2d 920, 924 (1948) the court said:

> "The *existence* of a conspiracy cannot be established against an alleged conspirator by evidence of the *acts* or declarations of his alleged co-conspirator done or made in his absence." (Emphasis supplied.)

In our Petition for Certiorari we complained at some length that the instructions given by the court in the course of the trial, which supposedly limited the effect of declarations by alleged co-conspirators, were so erroneous that their effect was the reverse of that probably intended. Possibly, in denying certiorari, Your Honors have placed a construction different from ours upon the language of the trial court—perhaps even that construction suggested by the government in its answer to our petition. But what construction could be placed on the failure of the trial court to make *any* limitation upon the effect of evidence concerning acts of one alleged conspirator on another?

We respectfully submit that the government could not as to these latter matters, impose the construction on the trial court's failure to instruct properly, that the jury, without instruction, properly limited the evidence. Nor do we think such construction could be adopted by this Court.

The Court of Appeals in its opinion in this case, adopted a *tour de force* to avoid ascribing impropriety to the trial court's failure properly to limit evidence of petitioner's co-conspirators' acts. The Court of Appeals held (see Opinion, Pet. p. 39) that since a government witness had already heard petitioner utter statements pertaining to counterfeit bills, that therefore he was entitled to no instruction placing a limit upon the effect of evidence of his supposed co-conspirators' acts. But if those acts were considered by the jury as establishing the existence of a conspiracy between Morris and his supposed co-conspirator, then they were improperly considered, notwithstanding some of the evidence showed petitioner knew something about a counterfeiting transaction. His knowledge thereof, if he had such knowledge, could establish neither the existence of, nor his membership in, a counterfeiting conspiracy.

We respectfully submit to the court that what the Court of Appeals has done in so expressing itself, is to hold in effect that once a defendant has mere knowledge of the commission of a criminal offense, the acts of another render him *particeps crimini*. Criminal liability could scarcely be imposed on a more vicarious basis.

* * * * * *

While we address these matters to the Court as additional reasons why Certiorari ought to be granted herein, we are hopeful that should the Court grant our Petition for Rehearing, it will at least consider the possibility of reviewing the matters originally raised, owing to their close relationship to those now raised.

CONCLUSION.

For the foregoing reasons and for the reasons urged in the original Petition for Certiorari, we respectfully pray that this Court grant a rehearing and that upon such rehearing, grant our Petition for a Writ of Certiorari.

Respectfully submitted,

FRANK W. OLIVER,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

Frank W. Oliver, attorney for petitioner herein, certifies that the within Petition for Rehearing is filed in accordance with Rule 58 of the Rules of this Court and is presented in good and earnest faith and is not for the purpose of delay; and he further certifies that the petition is restricted to a circumstance of substantial effect not previously urged in this Court.

Frank W. Oliver further certifies that he has mailed three copies of the within Petition to the Solicitor General, Department of Justice, Washington 25, D. C.; and has also mailed a copy of said Petition to the United States Attorney, United States Courthouse, Chicago, Illinois.

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Frank W. Oliver